No. 99-1497

Supreme Court, U.S.
FILED
APR 27 2000
CLERK

In The

Supreme Court of the United States

S. KIMBERLY BELSHE, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES,

Petitioner,

v.

CHILDREN'S HOSPITAL AND HEALTH CENTER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

BACKGROUND FACTS

Having lost in the District Court and then again in the Circuit Court, the petitioner asks that the U.S. Supreme Court review these decisions to determine whether the Boren Amendment and its successor apply to out-of-state hospitals. There are no cases which support the position urged by petitioner. Nor is petitioner's view consistent with the longstanding interpretation of the Boren Amendment by the Health Care Financing Administration ("HCFA"), or even petitioner's own actions. Indeed, until this litigation, HCFA and petitioner readily acknowledged that the Boren Amendment governed the reimbursement of out-of-state hospitals.

The only other federal law that could be applied to out-of-state hospitals is the "equal access" provision, a view espoused by the Circuit Court dissent. However, petitioner is out of compliance with that federal law too. Thus, petitioner's reimbursement program for out-of-state hospitals is illegal regardless of which law applies.

II.

THE BOREN AMENDMENT AND ITS SUCCESSOR GOVERN THE REIMBURSMENT OF OUT-OF-STATE HOSPITALS

A. All of the Cases Conclude that the Boren Amendment Governs Out-of-State Hospitals.

The District Court and the majority opinion concluded that the Boren Amendment and its successor apply to out-of-state hospitals. This opinion is consistent with the only two other Courts which have considered this issue, the leading case of *West Virginia Univ. Hosps., Inc. v. Casey*, 885 F.2d 11 (3rd Cir. 1989), *aff'd on other grounds*, 499 U.S. 83 (1991) (applying the Boren Amendment to invalidate the reimbursement scheme that Pennsylvania used for reimbursing out-of-state hospitals) and *Multicare Medical Center v. Washington*, 768 F. Supp. 1349 (W.D. Wash. 1991) (applying the Boren Amendment to the State of Washington's reimbursement of both in-state and out-of-state hospitals).

B. The Boren Amendment Plainly Covers Out-of-State Hospitals.

The Boren Amendment plainly refers to "hospital services" without limiting such services to those provided by in-state hospitals. According to the majority opinion, "Because the statute does not distinguish between in-state and out-of-state hospitals, the plain meaning of the statute is that Congress did not intend to differentiate between the two." Petitioner's Appendix A, p. 12a. The District Court arrived at the same conclusion, noting that "Where the plain language does not create a

distinction or exception, it would be foolhardy for a court to presume one exists." Petitioner's Appendix C, p. 57a (citation omitted). The District Court added, "Rather the presumption should go in the other direction: unless reliance on other interpretive canons provide a reason to believe Congress intended to exclude out-of-state hospitals from the hospitals referred to in the Boren Amendment, then the term should be given its full and natural meaning." Petitioner's Appendix C, pps. 57a-58a.

C. HCFA and Petitioner Had For Many Years Acknowledged that the Boren Amendment Applied to Out-of-State Hospitals.

As the lower courts correctly note, HCFA had for many years taken the position that the Boren Amendment and the disproportionate share ("DSH") requirement therein applied to out-of-state hospitals. In the preamble to a proposed DSH regulation, HCFA said that "States must bear in mind that the [DSH] statute uses the term 'hospital' with no limitations. Consequently, States must apply the provisions to all facilities that qualify as 'hospitals.' " 55 Fed. Reg. 10077, 10079 (March 19, 1990). In *Multicare Medical Center v. Washington*, 768 F. Supp. 1349, 1401 (W.D. Wash. 1991), the court found that Washington was required to make DSH payments to out-of-state hospitals that served the state's Medicaid recipients. In reaching this conclusion, the *Multicare* court noted that HCFA had informed the state that it was required to make such payments. *Multicare Medical Center v. Washington*, 768 F. Supp. at 1388. And, in correspondence between HCFA and the California Department of Health Services ("CDHS") HCFA reviewed, and subsequently approved,

changes in California's DSH program for out-of-state hospitals under the Boren Amendment provisions.

From all of these facts, the District Court reasonably concluded that "HCFA at one time assumed that the Boren Amendment applied to out-of-state hospitals." Petitioner's Appendix C, p. 53a. As a result, both District Court and the Circuit Court properly rejected the view espoused for the first time by HCFA's counsel in this litigation, and relied instead on its consistent written pronouncements and actions to decipher HCFA's actual interpretation of the Boren Amendment. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (holding that deference to nothing more than an agency's convenient litigating position would be entirely inappropriate).

D. There is No Merit to Petitioner's Claim of Administrative Inconvenience.

It is well-established that "[t]he administrative burden imposed, without more, is not relevant in interpreting a statute." Petitioner's Appendix C, p. 55a. In fact, when faced with the analogous issue involving the application of the Boren Amendment (and the DSH requirement therein) to out-of-state hospitals the Third Circuit held that "Pennsylvania's excuse of administrative burden does not, in this case, provide a rational basis for WVUH's grossly diminished reimbursement rates." *West Virginia Univ. Hosps.*, 885 F.2d at 29.

CDHS' claim that requiring states to make DSH payment to out-of-state hospitals would be administratively difficult is utterly false because many states already make DSH payments to out-of-state hospitals. These states

include, but are not limited to, West Virginia, Washington, Kentucky, Idaho, Illinois, Maryland, North Carolina, Wyoming, Arkansas, Iowa, and Oregon.[1] The fact that many states already make DSH payments to out-of-state hospitals proves that the administrative impracticalities the CDHS describes are not based in reality.

III.

THE EQUAL ACCESS PROVISION DOES NOT APPLY TO OUT-OF-STATE HOSPITALS

The only other federal law that could be applied to the reimbursement of out-of-state hospitals is the "equal access" provision, a view espoused by the dissent to the Circuit Court decision. However, as the District Court correctly notes, the equal access provision relates to physicians not hospitals: " . . . the legislative history of the equal provision suggests it is directed at noninstitutional providers. The House Report refers to access to and inducement of physicians rather then facilities." Petitioner's Appendix C, p. 63a. This view has been explicitly

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[1] *See e.g., West Virginia Univ. Hosp.*, 885 F.2d 11 and *Multicare Medical Center v. Washington*, 768 F. Supp. 1349 (W.D. Wash. 1991); *see also* Kentucky (907 KAR 1:013E § 3(9)); Idaho (IDAPA 16.03.10.454 (1998)); Illinois (89 Ill. Adm. Code 148.120 (1998)); Maryland (CCH *Medicare and Medicaid Guide*, ¶ 6553-9); North Carolina (10 N.C.A.C. 26H.0214(c)); Wyoming (WCWR 048-130-024 § 9(e) (1998)); Arkansas (CCH *Medicare and Medicaid Guide*, ¶ 15,556, p. 6519-9); Iowa (CCH *Medicare and Medicaid Guide*, ¶ 15,586, p. 6543-60); and Oregon (CCH *Medicare and Medicaid Guide*, ¶ 15,630, p. 6587-11). Of course, there may be other states which also make DSH payments to out-of-state hospitals independent of any specific statutory or regulatory provision authorizing such payments.

adopted by the Eighth Circuit, and is consistent with the cases decided by the Ninth Circuit. *Id.*

Furthermore, under either the Boren Amendment or the equal access provision the CDHS is still out-of-compliance with federal law. In *Orthopedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), the Ninth Circuit held that the "equal access" provision, like the Boren Amendment, requires cost studies. *Id.* at 1499. Because it is uncontroverted that "[t]he CDHS gathered no information on the costs incurred by out-of-state hospitals and performed no empirical analysis of the effects of the reimbursement scheme on out-of-state hospitals," CHDS is out-of-compliance with *both* the Boren Amendment and the "equal access" provision. Petitioner's Appendix C, p. 41a. Thus, petitioner's out-of-state reimbursement rates violate federal law regardless of which law is deemed to apply.

IV.

THIS CASE IS NOT MOOT

During the pendency of this appeal the Boren Amendment was amended to relieve states of certain restrictive requirements. Under the Boren Amendment, hospitals had been required to submit written "assurances" and "findings" for HCFA approval. Under its successor, HCFA's role in the institutional payment process has been eliminated and replaced with a public approval process.

HCFA has allowed states to continue to use rates that had been approved under the Boren Amendment based on the recognition that rates which had been adopted

under the Boren Amendment would automatically be in compliance with the less restrictive statutory requirements now in place. However, HCFA has never required that any state, including petitioner, continue to operate under the Boren Amendment. Furthermore, HCFA makes it very clear that states which change their payment methodologies, and adopt a payment methodology not approved under the more stringent requirements of the Boren Amendment, need to comply with the new law. As the Circuit Court notes, "The CDHS has the option of complying with the Boren Amendment or with the public process provisions of the Balanced Budget Amendment of 1997. It does not have the option of failing to comply with either law." Petitioner's Appendix A, p. 17a.

It is ironic that the CDHS continues to operate under the Boren Amendment and to violate its requirements (as the lower courts found), while at the same time claiming that the Boren Amendment is moot. Of course, petitioner would like this case to be deemed moot so that it can continue to violate federal law.

Petitioner's mootness argument ignores the simple fact that the very purpose of this interlocutory appeal is to determine the law that applies to out-of-state hospitals. In that both the Boren Amendment and its successor are contained in the same statute, 42 U.S.C. § 1396a(a)(13), a decision concerning the applicability of the Boren Amendment will inevitably determine the applicability of the statute amending it, and ultimately CDHS's compliance with existing federal law. Or, if some other federal law applies, this interlocutory appeal will decide that issue as well.

Moreover, the Hospitals' claims for DSH monies cannot be moot because both the Boren Amendment and the statute that amended it contain essentially identical language mandating that states make additional payments to qualifying disproportionate share hospitals. As the Congressional Conference Committee explained, there was no change to the existing DHS law that "sets minimum standards by which a hospital may qualify as a disproportionate share (DSH) hospital, and minimum payments to be made to those hospitals." H. Conf. Rep. No. 105-217 at 875 (1997), reprinted in U.S.C.C.A.N. 176, 493. Indeed, the only recent change in the DSH law is that the Balanced Budget Act of 1997 added two requirements, that states submit information to HCFA for review (42 U.S.C. § 1396r-4(a)(2)(D)) and that states make payments directly to qualifying hospitals even though other Medicaid payments are made through managed care plans (42 U.S.C. § 1396r-4(i)). Other than these minor items, the DSH requirements in federal law were not changed by the Balanced Budget Act of 1997.

V.

CONCLUSION

For the foregoing reasons, we respectfully request that petitioner's request for a writ of certiorari be denied.

Dated: April 27, 2000

Respectfully submitted,

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